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# **Merchant Horticulture Produce Agreement**

**The Grower as set out in Schedule 1**

**Montague Farms Pty Ltd (ACN 673 574 804)**

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# Merchant Horticulture Produce Agreement

**Date** Refer to Schedule 1

## Parties

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Grower	Merchant
<b>Name:</b> Refer to Schedule 1	<b>Name:</b> Montague Farms Pty Ltd
<b>ACN:</b> Refer to Schedule 1	<b>ACN:</b> 673 574 804
<b>ABN:</b> Refer to Schedule 1	<b>ABN:</b> 11 673 574 804
<b>Address:</b> Refer to Schedule 1	<b>Address:</b> 10-18 Horswood Road, Narre Warren North, VIC, 3804
<b>Email:</b> Refer to Schedule 1	<b>Email:</b> scott.m@montaguefarms.com.au
<b>Phone:</b> Refer to Schedule 1	<b>Phone:</b> (03) 9709 8100

## Introduction

- A. The Grower grows the Horticulture Produce.
- B. The Merchant is a purchaser, processor, packer, marketer and distributor of the Horticulture Produce.
- C. The Grower wishes to sell the Horticulture Produce to the Merchant.
- D. For the Term of this Agreement, the Grower agrees to deliver and sell, and the Merchant agrees to buy, the Horticulture Produce of the type, quantity, quality and specifications stated in this Agreement.
- E. The Merchant may also provide various Services in relation to the Horticulture Produce of the Grower as set out in this Agreement.
- F. In consideration for the Grower selling the Horticulture Produce, the Merchant will pay the Purchase Price to the Grower in accordance with this Agreement.

## Operative provisions

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### 1. Purpose and interpretation

- 1.1 In this Agreement the following words have these meanings unless the contrary intention appears:

**Agreement** means this Merchant Horticulture Produce Agreement and all schedules, annexures and attachments to it, as amended by the parties in writing in accordance with its terms.

**Allocated Pool** has the meaning given to it in clause 14.2 of this Agreement.

**Business Day** means a day on which banks are open for general banking business in Melbourne, Victoria excluding Saturdays, Sundays and public holidays.

**Code** means the Horticulture Code of Conduct contained in the *Competition and Consumer (Industry Codes and Horticulture) Regulations 2017 (Cth)*, as amended from time to time.

**Commencement Date** means the date specified in clause 3 of this Agreement.

**Consequential Loss** means any loss of profit or revenue, anticipated loss of profit or revenue, loss of production, loss of business opportunity, loss of or damage to goodwill or reputation, reduction in the value of the business or interests in the business, loss of use or any other similar loss (howsoever arising) or any special, indirect, consequential, exemplary or punitive losses or damages, and **Consequential Losses** has a corresponding meaning.

**Corporations Act** means the *Corporations Act 2001 (Cth)*.

**Delivery** has the meaning given to it in clause 8.1 of this Agreement.

**Encumbrance** means any mortgage, lien, charge, pledge, assignment by way of security, security interest, title retention, preferential right or trust arrangement, claim, covenant, profit à prendre, easement or other security arrangement or any other arrangement having the same effect.

**Finance Party** has the meaning given to it in clause 32.2 of this Agreement.

**Government Agency** means any governmental, semi-governmental, administrative, fiscal or judicial body, department, commission, authority, tribunal, agency or entity whether foreign, federal, state, territorial or local.

**GST** means goods and services tax under the GST Law.

**GST Act** means *A New Tax System (Goods and Services Tax) Act 1999 (Cth)*.

**GST Law** has the same meaning as given in the GST Act.

**Horticulture Produce** means unprocessed fruit, unprocessed vegetables (including mushrooms and other edible fungi), unprocessed nuts, unprocessed herbs, other unprocessed edible plants.

**Ineligible Produce** has the meaning given in clause 13.2 of this Agreement.

**Produce Specifications** has the meaning given in clause 11.1 of this Agreement.

**Purchase Order** means a purchase order issued by the Merchant to the Grower in accordance with the terms of this Agreement for the supply of the Grower's Horticulture Produce, specifying the quantum of the Horticulture Produce, Purchase Price, Services Cost (if any) and delivery details (amongst other things).

**Purchase Price** means the amount determined under clause 6.1 of this Agreement.

**Reporting Period** means the period specified in clause 4.1 of this Agreement.

**Return** has the meaning given in clause 16.1 of this Agreement.

**Services** mean the services set out in the Services Pricing List which may be provided by the Merchant to the Grower, including delivery, storage, packing, sorting, grading, marketing and selling of the Grower's Horticulture Produce.

**Services Cost** has the meaning given in clause 6.3 of this Agreement.

**Services Pricing List** means a non-exhaustive list provided on an annual basis by the Merchant to the Grower setting out the Services that will be offered by the Merchant and the range of prices for those Services (as amended).

**Statement** has the meaning given in clause 4.2 of this Agreement.

**Statement Period** means the period specified in clause 4.3 of this Agreement.

**Tax** means any tax, levy, charge, impost, fee, deduction or withholding, which is assessed, levied, imposed or collected by any Government Agency and includes any tax payable under the GST Act or any interest, fine, penalty, charge, fee or any other amount imposed in addition to, or in respect of any of the above but excludes Duty.

**Term** means the period defined in clause 3 of this Agreement.

**Ultimate Customer** means the customer to whom the Merchant has sold the Grower's Horticulture Produce.

## 1.2 Interpretation

In this Agreement headings and boldings are for convenience only and do not affect the interpretation of this Agreement and, unless the context otherwise requires:

- (a) words importing the singular include the plural and vice versa;
- (b) words importing a gender include any gender;
- (c) where a word or phrase is given a particular meaning, other parts of speech and grammatical forms of a word or phrase defined in this Agreement have a corresponding meaning;
- (d) an expression importing a natural person includes any individual, company, partnership, joint venture, association, corporation or other body corporate and any Government Agency;
- (e) no provision of this Agreement will be construed adversely to a party solely on the ground that the party was responsible for the preparation of this Agreement or that provision;
- (f) when the day on which something must be done is not a Business Day, that thing must be done on the following Business Day;
- (g) words defined in the Corporations Act have the same meaning in this Agreement; and

- (h) a reference to:
  - (i) any thing (including any right) includes a part of that thing but nothing in this clause 1.2 implies that performance of part of an obligation constitutes performance of the obligation;
  - (ii) a clause, party, annexure, exhibit or schedule is a reference to a clause of, and a party, annexure, exhibit and schedule to, this Agreement and a reference to this Agreement includes any annexure, exhibit and schedule;
  - (iii) a statute, regulation, proclamation, ordinance or by-law includes all statutes, regulations, proclamations, ordinances or by-laws amending, consolidating or replacing it, and a reference to a statute includes all regulations, proclamations, ordinances and by-laws issued under that statute;
  - (iv) a document (including this Agreement) includes all amendments or supplements to, or replacements or novations of, that document;
  - (v) a party to a document includes that party's executors, administrators, successors, substitutes (including persons taking by novation) and permitted assigns;
  - (vi) "including", "for example" or "such as" when introducing an example, does not limit the meaning of the words to which the example relates to that example or examples of a similar kind;
  - (vii) "law" includes legislation, the rules of the general law, including common law and equity, and any judgment order or decree, declaration or ruling of a court of competent jurisdiction or Government Agency binding on a person or the assets of that person; and
  - (viii) a monetary amount is a reference to Australian dollars.

### 1.3 Application of the Code

- (a) Words defined in the Code have the same meaning in this Agreement.
- (b) If the Code is inconsistent with any term of this Agreement, the Code prevails and applies to the extent of the inconsistency.
- (c) This Agreement is a "horticulture produce agreement" as defined in the Code.
- (d) The Merchant enters into this Agreement as a "merchant" as defined in the Code.
- (e) The Grower enters into this Agreement as a "grower" as defined in the Code.

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## 2. Agreement

### 2.1 For the Term of this Agreement:

- (a) the Grower agrees to deliver and sell, and the Merchant agrees to buy, Horticulture Produce of the type, quantity, quality and specifications stated in this Agreement, for the payment of the Purchase Price determined in accordance with this Agreement; and
- (b) the Merchant may also provide various Services in relation to the Horticulture Produce of the Grower as set out in this Agreement.

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### **3. Term**

- 3.1 This Agreement will commence on the Commencement Date and will continue until it is terminated in accordance with clause 20 of this Agreement.

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### **4. Merchant's reporting obligations**

- 4.1 For the purposes of this Agreement, the Reporting Period is annually.
- 4.2 For each Reporting Period, the Merchant will give the Grower a Statement for the Reporting Period, specifying for the Grower's Horticulture Produce received by the Merchant during the Reporting Period:
- (a) Grower's reference or shipping note number;
  - (b) the date or dates on which the Horticulture Produce was purchased by the Merchant;
  - (c) the type and quantity of the Horticulture Produce purchased by the Merchant;
  - (d) the description of the quality of the Horticulture Produce purchased by the Merchant;
  - (e) the Purchase Price paid by the Merchant for the Horticulture Produce;
  - (f) the date on which the Horticulture Produce was delivered to the Merchant;
  - (g) the date or dates of re-sale of the Grower's Horticulture Produce by the Merchant to the Ultimate Customer;
  - (h) details of each amount deducted by the Merchant from the Purchase Price of the Horticulture Produce; and
  - (i) details of any Ineligible Produce that is disposed of or otherwise dealt with in accordance with under clause 13;
- 4.3 The Merchant will give the Statement referred to in clause 4.2 to the Grower within the Statement Period, which is 60 business days following the end of the Reporting Period

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### **5. Merchant's other obligations**

- 5.1 During the period the Grower's Horticulture Produce is under the Merchant's control, the Merchant will exercise all reasonable care and skill in handling and storage to ensure that the Horticulture Produce remains of the highest quality possible.
- 5.2 The care and skill the Merchant must exercise under clause 5.1 must be exercised until the title of the Horticulture Produce passes to the Merchant in accordance with this Agreement.

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### **6. Purchase Order**

- 6.1 Prior to Delivery taking place, the Purchase Price for the Horticulture Produce must be agreed by the parties in the form of a Purchase Order, once the quantity of the Horticulture Produce have been determined. The method of which the parties will agree the Purchase Price is set out in Schedule 2 of this Agreement.



- 6.2 Where the Purchase Price for Horticulture Produce cannot be agreed in writing, the Merchant may reject the Horticulture Produce and clause 13 applies.
- 6.3 The Merchant is authorised to deduct from or offset against the Purchase Price payable to the Grower any fees, costs, charges, expenses, liabilities or amounts payable in connection with the Services, which are calculated in accordance with the Services Pricing List (where applicable) (**Services Cost**), including pursuant to clauses 8.6 and 9, or otherwise payable in pursuant to clause 9.
- 6.4 The Merchant must set out all Services Cost and any other fees, costs, charges, expenses, liabilities or amounts pursuant to clauses 8.6 and 9 payable in the Purchase Order where reasonably practicable.
- 6.5 Any Purchase Order issued by the Merchant to the Grower must be accepted by the Grower in writing prior to Delivery of the Grower's Horticulture Produce in accordance with clause 8.1.
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## **7. Payment**

- 7.1 Upon Delivery of the Horticulture Produce taking place, the Merchant must, within 30 Business Days, pay the Grower the amount payable described in the Purchase Order by electronic transfer to the Grower's bank account, unless otherwise agreed in writing between the Merchant and the Grower.
- 7.2 If the Merchant does not pay the Grower within the period specified or agreed under clause 7.1, the Grower may, in accordance with the Code:
- (a) suspend any further deliveries under the Agreement until the amount owed is paid; or
  - (b) cancel the Agreement.
- 

## **8. Delivery of Horticulture Produce**

- 8.1 For the purposes of this Agreement:
- (a) subject to the Grower's written acceptance of the relevant Purchase Order, delivery of Horticulture Produce occurs when:
    - (i) the Grower's Horticulture Produce is voluntarily received by the Merchant from the Grower for the purposes of immediately making the Horticulture Produce available for re-sale by the Merchant; or
    - (ii) the Grower's Horticulture Produce is delivered directly to and unloaded at the Ultimate Customer's premises in accordance with the Purchase Order,
  - (b) provided that delivery will not occur when:
    - (i) the Horticulture Produce is received at the Merchant's premises specified in clause 8.4 without:
      - (A) the Merchant voluntarily taking possession of the Horticulture Produce; or
      - (B) the Grower's written acceptance of the Purchase Order,
    - (ii) the Merchant has rejected the Horticulture Produce in accordance with clause 13;

- (iii) the Ultimate Customer has rejected the Horticulture Produce delivered by the Grower; or
- (iv) the Grower has not complied with the delivery requirements specified in this clause 8;

(each of which is a **Non-Delivery Event**); and

- (c) where a Non-Delivery Event has occurred, delivery will be deemed to subsequently occur upon the Merchant voluntarily receiving or obtaining possession of the Horticulture Produce.

- 8.2 The Grower will bear the costs of delivery of the Horticulture Produce to the Merchant, including pursuant to clause 8.6, unless agreed otherwise by the parties in writing.
- 8.3 The Grower will include with each delivery, documentation listing the quantity and type of all Horticulture Produce in the delivery.
- 8.4 Where the Grower delivers Horticulture Produce to the Merchant, the Grower is to deliver the Horticulture Produce to the Merchant's premises specified in Schedule 1.
- 8.5 The Merchant will be responsible for giving or taking reasonable steps to ensure that the Grower is given a document evidencing receipt of delivered Horticulture Produce.
- 8.6 At the request of the Grower, the Merchant:
- (a) may assist the Grower with arranging delivery of the Grower's Horticulture Produce to the Merchant's premises pursuant to clause 8.4 or the Ultimate Customer's premises as specified in the Purchase Order (at a fee advised by the Merchant to the Grower which will be in accordance with the Services Pricing List); and
  - (b) may (but for the avoidance of doubt is under no obligation to) pay, on behalf of the Grower, the costs associated with the delivery of the Grower's Horticulture Produce to the Merchant's premises pursuant to clause 8.4 or the Ultimate Customer's premises as specified in the Purchase Order.

These fees and costs for delivery of the Grower's Horticulture Produce shall be accounted for by the Merchant in accordance with clause 9 when calculating the amount payable to the Grower under this Agreement in respect of the Grower's Horticulture Produce and will be specified in the Purchase Order.

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## **9. Deductible amounts**

- 9.1 Pursuant to clause 6.3, the Merchant may deduct any fees, costs, charges, expenses or liabilities from the Purchase Price which the Merchant may determine, in good faith, are required in connection with the Services or the Agreement, being:
- (a) the costs, charges and expenses for the Merchant to provide the Services to the Grower, which will be calculated in accordance with the Services Pricing List (where applicable);
  - (b) for anything not included in the Services Pricing List, the actual costs, charges and expenses incurred by the Merchant to place the Grower's Horticulture Produce in a condition that is ready for immediate re-sale to the Ultimate Customer; and

- (c) any Commonwealth, State, local government or any statutory instrumentality taxes and charges incurred by the Merchant, excluding any such taxes and charges incurred by the Merchant as imposed on, or measured by, its overall net income.
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## **10. Grower's obligations**

- 10.1 The Grower agrees to provide documentation that is suitable to the Merchant that accurately describes the quantity, variety, size, class, description, and characteristics of the Horticulture Produce, including containers, prior to Delivery of Horticulture Produce to the Merchant.
  - 10.2 The Grower must not deliver Horticulture Produce to the Merchant that:
    - (a) does not comply with the Produce Specifications; or
    - (b) has not been solicited by the Merchant.
  - 10.3 The Grower agrees to implement and maintain an industry recognized HACCP based food safety and quality system that is subject to an annual third party audit. Copies of any current certification must be sent to the Merchant upon request.
  - 10.4 The Grower agrees to supply details of their registered Australian Business Number (ABN) prior to any payment being made the Merchant.
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## **11. Quality of Horticulture Produce**

- 11.1 The Merchant requires that, and the Grower warrants that, the Horticulture Produce delivered to the Merchant is fit for its purpose, and in every case, is packed or presented and complies with the following product specifications including in relation to quality and shelf life (**Produce Specifications**):
    - (a) written product and delivery specifications provided by the Merchant to the Grower from time to time or where reasonably necessary, reflecting the quality standards imposed on the Merchant by third parties, prior to the Purchase Price being set with respect to the Horticulture Produce or as otherwise agreed to in writing between the Merchant and the Grower;
    - (b) the FreshSpecs Produce Specifications that may be published by the Fresh Markets Australia from time to time; and
    - (c) the *National Measurement Act 1960* (Cth) and other applicable laws with respect to the Horticulture Produce.
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## **12. Quantity requirements**

- 12.1 Nothing in this Agreement obliges the Merchant to accept any particular volume or quantity of Horticulture Produce from the Grower pursuant to the terms of this Agreement. The Merchant may reject Horticulture Produce pursuant to clause 13 of this Agreement. Where the Merchant does accept Horticulture Produce from the Grower, then the terms of this Agreement apply.
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## **13. Rejection of Horticulture Produce**

- 13.1 The Merchant will accept and be deemed to have accepted Delivery of all Horticulture Produce delivered in accordance with this Agreement, unless the circumstances set out in this clause 13 apply.

- 13.2 The Merchant may reject all or in part the Horticulture Produce delivered by the Grower in the following circumstances:
- (a) if the Horticulture Produce delivered does not satisfy the type, quality or quantity requirement specified in clauses 11 and 12;
  - (b) if part of the delivered Horticulture Produce does not satisfy the requirements in clauses 11 and 12, and part of the delivered Horticulture Produce does satisfy those requirements, the Merchant may only reject the part of the Horticulture Produce that does not meet those requirements;
  - (c) if the Grower does not have right, title and interest in the Horticulture Produce, clear of all Encumbrances, claims and other adverse interests, delivered by it; or
  - (d) if the Grower delivers the Horticulture Produce in containers or packaging that cannot be safely managed by the Merchant.
- (collectively the **Ineligible Produce**).
- 13.3 The Merchant may only reject Ineligible Produce under clause 13.2 within 2 Business Days of Delivery or removal of the Horticulture Produce from long-term storage in accordance with this Agreement.
- 13.4 Where the Merchant rejects Ineligible Produce under clauses 13.2 and 13.3, the Merchant will within 24 hours after the time at which the Merchant has made the decision to reject the Ineligible Produce, notify the Grower of the rejection by telephone, fax, email or other electronic means.
- 13.5 Where the Merchant fails to comply with the obligation in clause 13.4, the Merchant will be deemed to have accepted Delivery of the Ineligible Produce.
- 13.6 The Merchant will notify the Grower in writing of the rejection under clause 13.4 and the reasons for the rejection within 2 Business Days of the Grower delivering the Ineligible Produce to the Merchant.
- 13.7 Where the Merchant elects to reject the Ineligible Produce under clause 13.4, then:
- (a) the Merchant shall be deemed not to have purchased the Ineligible Produce, and the Grower shall retain or re-acquire (as the case may be) title and risk in and to the Ineligible Produce;
  - (b) the Grower is not entitled to the Purchase Price with respect to the Ineligible Produce; and
  - (c) the Merchant will be deemed not to have received Delivery of the Ineligible Produce.
- 13.8 Where Ineligible Produce is rejected by the Merchant, the Merchant may:
- (a) return the Ineligible Produce to the Grower at the Grower's expense;
  - (b) deliver the Ineligible Produce to an alternative address at the Grower's expense;
  - (c) hold the Ineligible Produce at the Merchant's premises for collection by the Grower at an agreed time; or

- (d) negotiate the alternative treatment of the Ineligible Produce in accordance with clause 13.9.

13.9 The Merchant may, when advising the Grower of the rejection of the Ineligible Produce, invite the Grower to negotiate the alternative treatment of the Ineligible Produce by the Merchant, for example, supplying the Ineligible Produce to the Merchant or a third party for canning or juicing purposes on the terms to be agreed by the parties.

13.10 Reasonable costs and expenses incurred by the Merchant in respect of Ineligible Produce in accordance with clause 13.8 must be reimbursed by the Grower and will not require prior approval.

13.11 Despite anything else in this Agreement, the Merchant may elect to destroy and dispose of the Ineligible Produce if:

- (a) the Grower does not respond within 24 hours of notification in accordance with clause 13.4;
- (b) the Grower fails to retake possession of the Ineligible Produce within 5 Business Days of the Grower indicating an intention to do so under clause 13.8(c); or
- (c) no agreement on the Purchase Price has been reached between the Grower and Merchant within 1 Business Day of written notification of the rejection in accordance with clause 13.4.

The Grower authorises and confirms by virtue of entry into this Agreement, such action by the Merchant.

13.12 Where clause 13.11 applies any destruction, disposal and/or delivery of Ineligible Produce is at the Grower's expense.

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## 14. Pooling of Horticulture Produce

14.1 The Merchant may pool Horticulture Produce if delivered by the Grower under this Agreement with other produce if:

- (a) the other produce is of the same quality as the Horticulture Produce delivered by the Grower; and
- (b) the Grower's Horticulture Produce and the other produce meet the quality requirements, specified in clauses 11 of this Agreement.

14.2 Where the Merchant pools the Grower's Horticulture Produce, the Merchant will allocate the Horticulture Produce received from the Grower to a pool comprising other Horticulture Produce received from other growers. Such allocation will be done on the basis of different counts (sizes) within classes for each variety of Horticulture Produce (**Allocated Pool**).

14.3 Where the Merchant pools Horticulture Produce in accordance with this clause 14.2, the amount payable to the Grower will be a proportion of the total proceeds received by the Merchant for the Allocated Pool that is equal to the proportion of the pooled Horticulture Produce received from the Grower that formed part of the Allocated Pool.

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## 15. Title

- 15.1 The Grower warrants that:
- (a) it has all right, title and interest in the Horticulture Produce that it delivers, or is delivered on its behalf, to the Merchant and / or the Ultimate Customer (as applicable);
  - (b) title will pass to the Merchant clear of all Encumbrances, claims and other adverse interests; and
  - (c) the Grower is a "grower" as defined in the Code and is the grower of the Horticulture Produce.
- 15.2 The parties acknowledge that despite the Delivery of the Horticulture Produce under this Agreement, title and risk in respect of the Horticulture Produce shall only pass in accordance with clauses 15.3 and 15.4.
- 15.3 Despite anything else in this Agreement, title to the Horticulture Produce will only pass to the Merchant at the time that both:
- (a) the amount payable pursuant to a Purchase Order has been agreed to by the Merchant and the Grower with respect to the Horticulture Produce; and
  - (b) one of the following has occurred:
    - (i) to the extent the Horticulture Produce is delivered to the Merchant or directly to the Ultimate Customer (as applicable) - title to the Horticulture Produce will pass on Delivery of the Horticulture Produce;
    - (ii) to the extent the Horticulture Produce is delivered to the Merchant, and the Horticulture Produce is in a condition ready for immediate re-sale to the Ultimate Customer such that the Merchant does not need to perform any Services - title to the Horticulture Produce will pass on Delivery of the Horticulture Produce; or
    - (iii) to the extent the Horticulture Produce is delivered to the Merchant, and the Merchant is required to perform Services pursuant to the Purchase Order - title to the Horticulture Produce will pass at the time the Services are completed.
- 15.4 The Merchant will assume risk in respect of the Horticulture Produce once title to the Horticulture Produce passes to the Merchant under clause 15.3.

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## 16. Return of Horticulture Produce

- 16.1 The Grower agrees that any claims for credit which result following the sale of the Horticulture Produce by the Merchant to a third party, which claims are accepted by the Merchant (**Return**), due to the Horticulture Produce not complying with clauses 9, 11 and 15.1, may be deducted (after allowing for the new Purchase Price for some or all of the Horticulture Produce which may be payable to the Grower in the event that Delivery of such Horticulture Produce occurs after the Return) from the amounts payable by the Merchant to the Grower under clause 7.1, subject to notification by the Merchant within 2 Business Days from receipt of such claim request.

- 16.2 Horticulture Produce returned under clause 16.1 will be treated as Ineligible Produce and subject to clause 13.
- 16.3 The Grower acknowledges that any amount deducted under clause 16.1 represents a genuine pre-estimate of the Merchant's loss as a result of the Horticulture Produce not complying with clauses 9, 11 and 15.1.
- 16.4 Unless otherwise agreed, the Grower shall within 2 Business Days of advising the Merchant that it wishes to retake possession of the Ineligible Produce (at its own cost), remove from the Ineligible Produce from its place of Delivery.
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## **17. Insurance**

- 17.1 The Merchant shall not be obliged to keep insurances in respect of the Horticulture Produce in its legal and physical control at all time.
- 17.2 As at the date of this Agreement the details of the Merchant's insurance policy are as set out in Schedule 1.
- 17.3 The Merchant will not be liable for loss or damage to the Horticulture Produce arising from any cause or event outside of the control of the Merchant.
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## **18. Limitation of liability**

- 18.1 The maximum aggregate liability of the Merchant to the Grower arising out of or in connection with this Agreement, will in no event exceed the amount equivalent to the insurance cap for a policy of insurance to which the claim relates, and effected and maintained by the Merchant pursuant to the requirements of this Agreement or otherwise.
- 18.2 Notwithstanding any other provision of this Agreement to the contrary, to the maximum extent permitted by law, the Merchant shall not be liable for:
- (a) any Consequential Losses; and/or
  - (b) any losses, expenses or damages arising from a breach of this Agreement to the extent that those losses, expenses or damages were a direct result of the actions or inactions by the Grower.
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## **19. Dispute resolution**

- 19.1 In the event that there is a dispute with the Merchant under this Agreement, the Grower should contact the person specified in Schedule 1.
- 19.2 In the event that there is a dispute with the Grower under this Agreement, the Merchant should contact the person specified in Schedule 1.
- 19.3 The parties agree that if a dispute arises between them in relation to any matter covered by this Agreement, they will follow the dispute resolution procedure set out in Part 5 of the Code.
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## **20. Termination**

- 20.1 Subject to clause 20.2, this Agreement can be terminated by either party giving four weeks' written notice of termination to the other party.

- 20.2 Despite anything else in this Agreement, where the Term of this Agreement is 90 days or more, or is not specified, either party may terminate this Agreement at any time within the cooling-off period being 14 days after the day on which this Agreement was entered into.
- 20.3 Where this Agreement is terminated pursuant to clauses 20.1 and 20.2, any trade that has occurred under the Agreement before the termination is governed by the terms of this Agreement.
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## **21. Variation**

- 21.1 A variation of any term of this Agreement or a right or obligation created under it must be in writing and signed by all the parties.
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## **22. Notices**

- 22.1 Unless expressly stated otherwise in this Agreement any notice, certificate, consent, request, demand, approval, waiver or other communication (**Notice**) must be:
- (a) in legible writing and in English;
  - (b) signed by the sender (if an individual) or where the sender is a company, signed by an officer or authorised representative or in accordance with section 127 of the Corporations Act (or if sent by email, such individual, officer or authorised representative is identified as such in the email); and
  - (c) marked for the attention of and addressed to the addressee.
- 22.2 A Notice can be relied upon by the addressee and the addressee is not liable to any other person for any consequences of that reliance if the addressee believes it to be genuine, correct and authorised by the sender.
- 22.3 Notices must be hand delivered or sent by prepaid express post (next day delivery) or email to the addressee's address for notices specified in the notice details in the Parties section of this Agreement or to any other address or email a party notifies to the other under this clause.
- 22.4 In this clause 22, reference to an addressee includes a reference to an addressee's officers, agents or employees or any person reasonably believed by the sender to be an officer, agent or employee of the addressee.
- 22.5 Notices take effect from the time they are received or taken to be received under clause 22.6 (whichever happens first) unless a later time is specified.
- 22.6 Notice is taken to be received by the addressee if by:
- (a) delivery in person, when delivered to the addressee;
  - (b) post within the same state in Australia, on the second Business Day after the date of posting;
  - (c) post interstate in Australia, four Business Days from and including the date of postage; or
  - (d) post internationally, six Business Days from and including the date of postage; or



- (e) subject to clause 22.7, electronic mail (e-mail), four hours after the sent time (as recorded on the sender's e-mail server), unless the sender receives a notice from the recipient's email server or internet service provider that the message has not been delivered to the recipient.
- 22.7 An e-mail is regarded as legibly received unless the addressee telephones the sender within four hours after the e-mail is received or regarded as received under clause 22.6(e) and informs the sender that it is not legible.
- 22.8 Despite clauses 22.5 and 22.6, if a Notice is received or taken to be received under this clause 22 after 4:00pm in the place of receipt or on a non-Business Day, it is taken to be received at 9:00am (recipient's time) on the following Business Day and take effect from that time unless a later time is specified in the Notice.
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### **23. Governing law and jurisdiction**

- 23.1 This Agreement is governed by the laws of Victoria, Australia.
- 23.2 Each party irrevocably and unconditionally submits to the jurisdiction of the courts of Victoria and any courts which have jurisdiction to hear appeals from any of those courts in respect of any proceedings in connection with this Agreement.
- 23.3 Each party waives any right it has to object to an action being brought in the courts of Victoria including by claiming that the action has been brought in an inconvenient forum or that those courts do not have jurisdiction.
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### **24. Prohibition or enforceability**

- 24.1 Any provision of, or the application of any provision of, this Agreement, which is prohibited, void, illegal or unenforceable in any jurisdiction:
- (a) is, in that jurisdiction, ineffective only to the extent to which it is void, illegal, unenforceable or prohibited;
  - (b) does not affect the validity, legality or enforceability of that provision in any other jurisdiction or of the remaining provisions of this Agreement in that or any other jurisdiction; and
  - (c) is severable from this Agreement and will not affect the remaining provisions of this Agreement.
- 24.2 The application of this clause 24 is not limited by any other provision of this Agreement in relation to severability, prohibition or enforceability. Clauses 24.1(a) and (c) have no effect if the severance alters the basic nature of this Agreement or is contrary to public policy.
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### **25. Waivers**

- 25.1 A waiver of any right, power, authority, discretion or remedy arising upon a breach of or default under this Agreement must be in writing and signed by the party granting the waiver.
- 25.2 A failure or delay in the exercise, or partial exercise, of a right, power, authority, discretion or remedy arising from a breach of or default under this Agreement, does not prevent the exercise of or result in a waiver of that right, power, authority, discretion or remedy at a later time.

- 25.3 A party is not entitled to rely on a delay in the exercise or non-exercise of a right, power, authority, discretion or remedy arising from a breach of this Agreement or default under this Agreement as constituting a waiver of that right, power, authority, discretion or remedy.
- 25.4 A party may not rely on any conduct of another party as a defence to the exercise of a right, power, authority, discretion or remedy by that other party.
- 25.5 A waiver is only effective in the specific instance and for the specific purpose for which it is given.
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## **26. Further assurances**

- 26.1 Each party must do all things necessary to give full effect to this Agreement and the transactions contemplated by this Agreement.
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## **27. Specific performance**

- 27.1 Each party acknowledges that monetary damages alone would not be adequate compensation to the other parties for a breach of its obligations under this Agreement and that accordingly injunctive relief, specific performance of those obligations and/or any other equitable remedy may be an appropriate remedy.
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## **28. Entire agreement**

- 28.1 This Agreement embodies the entire agreement between the parties with respect to the subject matter of this Agreement and supersedes any prior negotiation, arrangement, understanding or agreement with respect to the subject matter or any term of this Agreement.
- 28.2 Any statement, representation, term, warranty, condition, promise or undertaking made, given or agreed to in any prior negotiation, arrangement, understanding or agreement, has no effect except to the extent expressly set out or incorporated by reference in this Agreement.
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## **29. Method of execution**

- 29.1 This Agreement must be executed by either:
- (a) both parties executing the Agreement; or
  - (b) the Grower giving written notice indicating acceptance of the terms of the Agreement by email.
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## **30. Counterparts**

- 30.1 This Agreement may be executed in any number of counterparts.
- 30.2 All counterparts, taken together, constitute one instrument.
- 30.3 A party may execute this Agreement by signing any counterpart.
- 30.4 This Agreement is binding on the parties on exchange of counterparts. A copy of a counterpart that is electronically scanned and emailed:
- (a) must be treated as an original counterpart;
  - (b) is sufficient evidence of the execution of the original; and

(c) may be produced in evidence for all purposes in place of the original.

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### **31. Non-merger**

31.1 No provision of this Agreement merges on execution or termination.

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### **32. No assignment**

32.1 Subject to clause 32.2, a party may not assign or novate this Agreement or otherwise transfer the benefit of this Agreement or an obligation, right or remedy under it, without the prior written consent of the other parties which consent must not be unreasonably withheld or delayed.

32.2 The Merchant may grant Encumbrances over, and assign the benefit of its rights under, this Agreement in favour of:

- (a) any secured lenders or any other person providing financial accommodation on secured terms to the Merchant and any of its related bodies corporate (each, a **Finance Party**); and
- (b) any person or persons acting as trustee or agent for Finance Party in respect of facilities made available to the Merchant or any of its related bodies corporate, and

in the event of enforcement of such Encumbrance but in no other circumstance, the Merchant or the Finance Parties or their agents or trustee may also assign the benefit of the Merchant's rights under this Agreement to any purchaser or assignee from a Finance Party or such agent or trustee (or any receiver appointed by any of them) who acquires the shares or all or any part of the business of the Merchant or any of its related bodies corporate.

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### **33. Relationship**

33.1 Unless expressly stated otherwise, this Agreement does not create a relationship of employment, trust, agency or partnership between the Parties.

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### **34. GST**

34.1 In this clause 34, the expressions **adjustment note, consideration, GST, supply, tax invoice, supplier, recipient and taxable supply** have the meanings given to those expressions in the GST Act.

34.2 For the avoidance of doubt, GST excludes any penalties or additional tax imposed in relation to the GST.

34.3 Unless otherwise expressly stated, the consideration to be provided or payment obligation under this Agreement is exclusive of GST.

34.4 Despite any other provision in this Agreement, if GST is imposed on any supply made under this Agreement, the recipient must pay to the supplier an amount equal to the GST payable on the supply.

34.5 The recipient must pay the amount referred to in clause 34 in addition to and at the same time as payment for the supply is required to be made under this Agreement.

34.6 The supplier will be responsible for any GST penalties, interest or additional tax imposed on the supplier and attributable to its act or omission.

- 34.7 If a supply is made to which GST applies or is varied under this Agreement, the supplier must provide to the recipient of the supply a valid tax invoice or adjustment note at or before the time of payment or variation.
- 34.8 If the amount of GST paid or payable by the supplier on any supply made under this Agreement differs from the amount of GST paid by the recipient, because the Commissioner of Taxation lawfully adjusts the value of the taxable supply for the purpose of calculating GST, then the amount of GST paid by the recipient will be adjusted accordingly by a further payment by the recipient to the supplier or the supplier to the recipient, as the case requires.

## Execution

**Executed** as an agreement.

### For an individual Grower

**Signed by**

\_\_\_\_\_  
Signature of Grower

\_\_\_\_\_  
Name of Grower (please print)

### For a company Grower

**Signed by**

(ACN                    )

in accordance with section 127 of the  
*Corporations Act 2001(Cth)*:

\_\_\_\_\_  
Signature of Director

\_\_\_\_\_  
Signature of Director/Company Secretary

\_\_\_\_\_  
Name of Director (please print)

\_\_\_\_\_  
Name of Director/Company Secretary  
(please print)

**Signed** for and on behalf of  
**Montague Farms Pty Ltd (ACN 673 574  
804)**

in accordance with section 126 of the  
*Corporations Act 2001(Cth)* by its duly  
authorised representative:

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Signature of Authorised Representative

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Name of Authorised Representative (please  
print)

## Schedule 1

### Details for Agreement

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Grower details	
Name:	[insert]
ACN:	[insert]
ABN:	[insert]
Contact:	[insert]
Address:	[insert]
Email:	[insert]
Phone:	[insert]
Agreement details	
Date of Agreement:	[insert]
Commencement Date:	The date of this Agreement or date the last party signs or confirms acceptance of this Agreement in accordance with clause 29 (whichever is the latter).
Merchant's premises (clause 8.4)	
Address:	10-18 Horswood Road, Narre Warren North, Vic, 3804.
Insurance details (clause 17.2)	
Insurer:	The insurance policy is with [insert].
Insurance policy limit coverage:	The maximum amount of insurance cover provided by the policy in respect of claims that may be made in relation to the Horticulture Produce is \$100,000 per occurrence.
Insurance policy coverage:	The policy covers fire, theft and accidental damage (other than deterioration of quality or any other inherent losses).
Dispute resolution contacts (clause 19)	
Merchant contact:	Name: Scott Montague Phone: 0408 750 868 Email: scott.m@montaguefarms.com.au
Grower contact:	Refer to the Grower details above.

## Schedule 2

### Pricing Formula

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1. On an annual basis, the Merchant will provide the Grower with a season-long price list, which will specify the minimum price or the range of prices that the Merchant will pay per storage bin for each variety of Horticulture Product to be delivered to the Merchant. Payment of the minimum price specified will be subject to:
  - (a) the Horticulture Produce delivered to the Merchant;
  - (b) the Merchant's acceptance or rejection of the Horticulture Produce; and
  - (c) Any other exclusions or limitations as may be advised by the Merchant to the Grower when issuing the price list.
2. Within 3 days following Delivery of the Grower's Horticulture Produce to the Merchant, the Merchant will give the Grower in writing:
  - (a) a pre-sizing report, setting out detail of the size and grading of that portion of the Horticulture Produce that has been pre-sized;
  - (b) an indicative price per storage bin that the Merchant forecasts will be payable by the Merchant to the Grower, calculated by reference to the quantity and quality of the Horticulture Produce as indicated in the pre-sizing report, and the Merchant's then-current and applicable price list for each variety of Horticulture Produce (**Pricing Methodology**).
3. The Grower must notify the Merchant of the Grower's acceptance or rejection of the Pricing Methodology, within 2 Business Days of receipt from the Merchant.
4. If the Grower accepts the Pricing Methodology, then the Grower acknowledges, accepts and agrees as follows:
  - (c) the Pricing Methodology will be used to calculate the ultimate purchase price payable by the Merchant to the Grower for the Horticulture Produce;
  - (d) the quantity of any Ineligible Produce will not be used in calculating the Purchase Price payable under the Pricing Methodology;
  - (e) any Ineligible Produce will be returned to the Grower at the times and in the manner set out in clause 13 of the Agreement; and
  - (f) title in and to the Horticulture Produce will pass to the Merchant at the times and in the manner set out in clause 15 of the Agreement.
5. The Merchant will make payment of the ultimate Purchase Price to the Grower, for the relevant Horticulture Produce, calculated by reference to the Pricing Methodology, within 21 days of production of the Grower's invoice.
6. If the Grower rejects the Pricing Methodology, then the Grower must re-take possession of the Horticulture Produce and clauses 13.8 and 13.9 of the Agreement shall apply.